STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM MICHIGAN COURT OF APPEALS
(Fort Hood, P.J., and Sawyer and Donofrio, JJ.)

VIVIAN ATKINS, Plaintiff-Appellee, v. SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION d/b/a SMART, Defendant-Appellant.	Supreme Court No. 140401 Court of Appeals No. 288461 Wayne County Circuit Court Case No. 07-721025-NI Hon. Kathleen MacDonald

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BRIEF OF *AMICUS CURIAE* MICHIGAN ASSOCIATION FOR JUSTICE IN SUPPORT OF PLAINTIFF-APPELLEE

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Statement of Interest

The Michigan Association for Justice ("MAJ") is an organization of Michigan lawyers engaged primarily in litigation and trial work. Comprised of more than 1,600 attorneys, the Michigan Association for Justice recognizes an obligation to assist this Court on important issues of law that would substantially affect the orderly administration of justice in the trial courts of this State. Amicus believe that the issues presented in this case have a direct and substantial impact on the rights of Michigan citizens that have claims for injuries against the transportation authority in this state. For these reasons, and those set forth more fully below, Amicus Curiae MAJ respectfully submits this Brief in support of Plaintiff-Appellee.

Statement of Basis of Jurisdiction

On November 9, 2007, Wayne County Circuit Court Judge Kathleen MacDonald entered an order granting summary disposition in favor of Defendant, Suburban Mobility Authority for Regional Transportation ("SMART"). Plaintiff filed a timely claim of appeal. The Court of Appeals reversed the trial court's order in an October 22, 2009 unpublished per curiam opinion. Defendant SMART moved for reconsideration, which was denied by an order entered on December 8, 2009. Thereafter, Defendant SMART filed a timely application for leave to appeal on January 19, 2010.

In a June 22, 2011 Order, this Court granted oral argument on Defendant's application and directed "the parties shall address whether written notice of the plaintiff's no-fault claim, together with SMART's knowledge of facts that could give rise to a tort claim by the plaintiff, constituted written notice of her tort claim sufficient to comply with MCL 124.419."

Statement of Issues Presented

I. **Were the Literal Requirements of MCL 124.419 Met and Was the Purpose of the Statutory Notice Provision Satisfied Where: (1) SMART had Actual Notice of the Incident as it Occurred, (2) SMART's Driver Completed a Written Accident Report on the Date of the Incident, (3) SMART's Third Party Claims Administrator Contacted Plaintiff After the Incident and Took a Recorded Statement, and (4) Plaintiff Filed an Application for No-Fault Benefits with SMART's Third Party Claims Administrator Less Than Thirty Days After the Incident, Providing a Written Description of the Incident and Plaintiff's Injuries?**

Amicus answers, "Yes."

II. **In the Event that this Court Concludes that the 60-Day Notice Provision in MCL 124.419 was Not Satisfied, Should This Court Reconsider *Rowland v Washtenaw County Road Commission,* 477 Mich 197 (2007) and Reverse the Court of Appeals' Judgment in Favor of Defendant in this Matter on the Ground that Defendant Has Not Alleged or Shown Any Prejudice From the Manner or Time of Notice?**

Amicus answers, "Yes."

III. **Alternatively, Should *Rowland's* Application be Limited to the Notice Provision for the Highway Exception to Governmental Immunity Set Forth in MCL 691.1404(1)?**

Amicus answers, "Yes."

IV. **Alternatively, Are There Substantial Constitutional Questions Posed by a 60-Day "Notice" Provision Which Abolishes a Substantively Meritorious Cause of Action If Prejudice Is Not Considered?**

Amicus answers, "Yes."

Statement of Material Facts and Proceedings

On September 15, 2006, the plaintiff, Vivian Atkins, sustained injuries to her shoulders and back when two SMART buses collided. The accident was immediately investigated by SMART, who sent out its investigators to the scene of the accident. Written statements were obtained from the bus drivers and two written reports were completed by SMART's representatives – a Road Supervisor's Accident Investigation Report and a SMART Transit Accident Report.

On September 25, 2006, Ms. Atkins presented her claim to SMART. Notably, a "SMART Notice of Assignment" was completed by "Eileen" on September 25, 2006 at 3:05 p.m. (Plaintiff's Exhibit J attached to Plaintiff's Court of Appeals' Brief on Appeal). The Notice of Assignment reflects that the "NAME & NO OF PERSON REPORTING LOSS" was the "**claimant**", who is identified as Vivian Atkins. The Notice of Assignment states that "date of injury" was September 15, 2006 and includes the following description of the incident: "The bus the claimant was riding on turned onto Jefferson and hit another SMART bus." Ms. Atkins' address and phone number are included on the Notice and her injuries are noted as "hurt back and shoulder." *Id.*

On the same date, just one hour later at 4:05 p.m., Kim Hanes, an adjuster from the ASU Group (SMART's third party claims administrator) took a recorded state from Ms. Atkins, which included the following information: her name, address, phone number, date of birth, social security number, automobile insurance information, health insurance information, employment information, the date of the accident, the weather, the nature of the accident and who was at fault. Ms. Atkins described the injuries that she sustained to her shoulders and back and the treatment that she sought.

The ASU file includes a number of "file notes," including one regarding the adjuster's conversation with Ms. Atkins on September 25, 2006 (Plaintiff's Exhibit C attached to Plaintiff's

Court of Appeals' Brief on Appeal). The adjuster indicated that she "[a]dvised of Affidavit AFB [Application for Benefits] Auth APR that I would be sending for her to fill out and return. Explained the process and gave her my number for any additional questions." *Id.*

Following the recorded statement, the ASU adjuster mailed Ms. Atkins an application for no-fault benefits. Ms. Atkins completed the application just 16 days after the accident and returned it to the claims adjuster, along with a listing of the names and addresses of all of the treating physicians, hospitals or clinics where the claimant received treatment or evaluation of her injuries. Ms. Atkins also described her injuries and provided a brief description of the accident. (Plaintiff's Exhibit D attached to Plaintiff's Court of Appeals' Brief on Appeal).

In addition to the above statements and information, the claims adjuster obtained the Ms. Atkins' medical records and reports from her attending physicians, all within 60 days of the accident. The adjuster's file included several notations within the 60-day notice period, which reflected that Ms. Atkins was off of work and that her mother and daughter were performing household services. Defendant's agent further noted that the anticipated wage loss, treatment, and household services would exceed the current file reserves. (Plaintiff's Exhibit C attached to Plaintiff's Court of Appeals' Brief on Appeal).

Less than one year after the accident, and well within the three-year limitations period, Ms. Atkins filed her negligence action against SMART. Defendant filed a motion for summary disposition, asserting that Ms. Atkins failed to comply with the 60-day notice provision under MCL 124.419 because Ms. Atkins had provided only notice of the *injury*, not the *claim*. The trial court agreed and further held that, under *Rowland*, SMART did not need to show that it was prejudiced by the absence of timely notice.

In an October 22, 2009 unpublished opinion, the Court of Appeals reversed the trial court's

grant of summary disposition in favor of SMART. The Court noted that there was no dispute that Ms. Atkins had timely notified SMART of her injuries and applied for first-party benefits; rather, the only question was whether the information received by SMART satisfied the notice provision of MCL 124.419. The Court observed that the statute does not contain any specific requirements of elements that must be included in the notice and, further, the statute does not delineate between a notice of a claim for first-party no-fault benefits and a notice of a third-party tort claim. Recognizing that the only requirement is that the plaintiff provides "written notice" of a "claim", the *Atkins* Court examined this Court's definitions of a "claim" and concluded:

> [D]efendant had notice of the operative facts needed to anticipate plaintiff's tort claim, and plaintiff had demanded payment for her injuries. The statute does not require a defendant to know what legal theory a plaintiff will pursue, only that it have notice of facts giving rise to a right to seek damages or payment. Therefore, we hold that the information defendant had before the expiration of the 60-day period was sufficient to provide written notice of plaintiff's third-party claim. [Slip Opinion, p 3.]

On June 22, 2011, this Court entered an order directing that oral argument be held on whether to grant the application or take other peremptory action and directed "the parties shall address whether written notice of the plaintiff's no-fault claim, together with SMART's knowledge of facts that could give rise to a tort claim by the plaintiff, constituted written notice of her tort claim sufficient to comply with MCL 124.419."

There is At Least One Other Case Pending in This Court That Is Affected by the Issues in this Matter

The interpretation and application of the statutory language of MCL 124.419 could have a dramatic and patently unfair impact on true victims of wrongful behavior. Moreover, as set forth more fully below, *Rowland* was wrongly decided and that decision has a significant impact on the jurisprudence in this case, as well on victims of governmental negligence.

Further, as of the filing of this Amicus brief, there is at least one other case pending in this Court that is affected by the legal issues in this matter. In *Smith v SMART* (Supreme Court No. 142515), the plaintiff was riding his bicycle as close as practicable to the right-hand curb or edge of the roadway when he was forced off of the road by a SMART bus, causing him to fall from his bicycle and strike the pavement. The bus driver did not stop. Within 24 hours, Plaintiff reported the accident to the local police, as well as SMART. Just two days after the accident, SMART sent the complaint to the ASU Group (SMART's third party claims administrator), who then contacted the plaintiff and conducted a recorded telephone interview (three days after the accident).

The recorded statement taken by the ASU Group identified the date, the claimant's name and address, the location of the accident, the time, the direction of travel of the bus and his bicycle, the traffic conditions, the weather conditions, the movement of the bus towards him and its bumping him, forcing his bike into the curb, as well as describing his injuries and damages to his bicycle. The statement further provided the names and location of the various doctor visits the plaintiff made that day and the fact that a police report was made. The ASU Group emailed a summary of the interview to SMART. One week after the accident, SMART called the plaintiff, advising him about the no-fault law and indicating that it would send him the proper forms for making such a claim. Finally, 2 ½ months after the accident, ASU sent a letter to the plaintiff denying his claim because SMART allegedly had no record of the accident.

The plaintiff filed his negligence action against SMART well within the three-year limitations period. Nonetheless, SMART moved for summary disposition, arguing that the plaintiff's action was barred because he failed to comply with the 60-day notice provision in MCL 124.419. Despite the fact that SMART had information regarding the details of the accident, the plaintiff's identifying information and details of the plaintiff's injuries all within four days of the accident, the trial court granted SMART's motion for summary disposition.

The plaintiff appealed. In a 2-1 decision, the Court of Appeals reversed the grant of summary disposition and remanded the matter to the trial court for further proceedings. *Smith v SMART*, unpublished opinion per curiam of the Court of Appeals, issued December 16, 2010 (Docket No. 294311). First, the Court of Appeals' majority concluded that, at a minimum, the plaintiff substantially complied with MCL 124.419 because the claims adjuster's email to SMART qualified as a writing to defendant, the email informed SMART of the nature of the accident and the injuries incurred by plaintiff (who was described as being the "claimant"), and the email was received within 60 days of the accident. The majority noted that there is no language within the statute requiring that it must be the plaintiff or the injured person that serves the notice.

Furthermore, even assuming a lack of compliance, the *Smith* majority held that SMART waived compliance by way of conduct which stopped it from interposing MCL 124.419. Specifically, the majority stated, in pertinent part, as follows:

> [W]e can reach no other conclusion than that defendant processed the case within the first 60 days of the accident as a claim for compensation associated with plaintiff's personal injuries and damages to his bike, and that defendant then denied the claim. Despite processing the matter and treating plaintiff's communications as a claim based upon alleged injuries and property damage and then rendering a disposition thereof, defendant now argues that summary dismissal is appropriate because it was not served with a written notice of a claim within 60 days of the occurrence.
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> While defendant had a right to the notice outlined in MCL 124.419, it failed

> to demand compliance by plaintiff, assuming a lack thereof, when its adjuster proceeded to interview plaintiff and gather information, when it effectively acted as if it was processing a claim, and when it formally denied the claim. It defies logic to allow defendant to successfully assert that notice of a claim was inadequate after defendant essentially processed and denied a claim. [Slip Opinion, p. 4.]

Defendant SMART filed an application for leave to appeal with this Court on January 27, 2011. The application is currently pending.

Law and Argument

I. Standard of Review

A. Summary Disposition Standard of Review

Defendant SMART sought summary disposition pursuant to MCR 2.116(C)(7) and (C)(8). This Court reviews decisions regarding summary disposition de novo. *Maskery v Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003).

When a motion is filed pursuant to MCR 2.116(C)(7), the Court must consider not only the pleadings, but also any affidavits, depositions, admissions, or documentary evidence that are filed or submitted by the parties. MCR 2.116(G)(5). The Court must accept all well-pleaded allegations as true and construe them in a light most favorable to the nonmoving party. *Spikes v Banks*, 231 Mich App 341, 346; 586 NW2d 106 (1998).

The test for a motion under MCR 2.116(C)(8), or failure to state a claim upon which relief can be granted, tests only the legal sufficiency of the claim, not whether there is any factual support for the claim. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Huff v Ford Motor Co*, 127 Mich App 287; 338 NW2d 387 (1983). All factual allegations of the claim are taken to be true along with any reasonable inferences or conclusions which may fairly be drawn from the facts alleged. *Kinnunen v Bohlinger*, 128 Mich App 635; 341 NW2d 167 (1983). Unless the claim is so clearly unenforceable as a matter of law that no factual development can possibly justify a right to recovery, a motion brought under MCR 2.116(C)(8) should be denied. *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001).

B. Rules of Statutory Interpretation

This matter also involves the interpretation of a statute. Questions of statutory interpretation are also reviewed de novo. *Nastal v Henderson & Assoc Investigations, Inc*, 471

Mich 712, 720; 691 NW2d 1 (2005).

The rules of statutory interpretation are well-established: The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Danse Corp v Madison Hts*, 466 Mich 175, 181-182; 644 NW2d 721 (2002). The Legislature is presumed to intend the meaning it plainly expressed. *Guardian Photo, Inc. v Dep't of Treasury*, 243 Mich App 270, 276-277; 621 NW2d 233(2000). "In reviewing the statute's language, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory." *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001). When the statute's language is clear and unambiguous, judicial construction is neither required nor permitted. *Frankenmuth Mut Ins Co v Marlette Homes, Inc.*, 456 Mich 511, 515; 573 NW2d 611 (1998).

When reviewing a statute, all non-technical "words and phrases shall be construed and understood according to the common and approved usage of the language," MCL 8.3a, and, if a term is not defined in the statute, a court may consult a dictionary to aid it in this goal. *Oakland Co Bd of Co Rd Comm'rs v Mich Prop & Cas Guaranty Ass'n*, 456 Mich 590, 604; 575 NW2d 751 (1998). A court should consider the plain meaning of a statute's words and their "'placement and purpose in the statutory scheme.'" *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999) (citation omitted). "Where the language used has been subject to judicial interpretation, the legislature is presumed to have used particular words in the sense in which they have been interpreted." *People v Powell*, 280 Mich 699, 703; 274 NW 372 (1937). See also *People v Wright*, 432 Mich 84, 92; 437 NW2d 603 (1989).

Further, in determining the meaning of the language in question, our courts are obedient to the settled principle that doubtful or ambiguous provision of a statute are construed not in isolation

but with reference to and in the context of related provisions in order to give effect to the whole enactment. It is outside the court's province to assign language, in the name of broad or narrow construction, a meaning at variance with the statute's plain intent. *Guitar v Bienick*, 402 Mich 152, 158; 262 NW2d 9 (1978).

This Court has repeatedly professed its unflagging commitment to a literal approach to statutory interpretation. The Court has regularly stressed that, in interpreting a statute, a court is prohibited from adding language to that statute which the Legislature failed to include. *American Federation of State County and Municipal Employees v City of Detroit,* 468 Mich 388, 400; 662 NW2d 695 (2003); *Lesner v Liquid Disposal, Inc*, 466 Mich 95, 101; 643 NW2d 553 (2002) (the Court is to apply the statute "as enacted without addition, subtraction or modification."); *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999) ("nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself."). The Court has also emphasized repeatedly in recent years that where a statute's language is clear, "we assume that the Legislature intended its plain meaning, and we enforce the statute as written." *Omelenchuck v City of Warren*, 466 Mich 524, 528; 647 NW2d 493 (2002); *Wickens*, 465 Mich at 60.

This Court has further indicated that its commitment to a strict textual approach to the interpretation of statutes has a constitutional dimension grounded in the concept of separation of powers. The Court most clearly expressed this view in *Robertson v DaimlerChrysler Corp*, 465 Mich 732; 641 NW2d 567 (2002), wherein it stated:

> The fundamental principles that we see at stake here implicate the role of this Court in the constitutional separation of powers. That is, we believe that it is the constitutional duty of this Court to interpret the words of the lawmaker, in this case the Legislature, and *not* to substitute our own policy preferences in order to make the law less "illogical". [*Id.* at 758.]

Thus, adherence to the literal text of a statute "force[s] Courts to respect the constitutional role of the legislature as a policy-making branch of government and constrain[s] the judiciary from encroaching on this dedicated sphere of constitutional responsibility." *People v McIntire*, 461 Mich 147, 153; 599 NW2d 102 (1999).

II. The Literal Requirements of MCL 124.419 Met and Was the Purpose of the Statutory Notice Provision Satisfied Where: (1) SMART had Actual Notice of the Incident as it Occurred, (2) SMART's Driver Completed a Written Accident Report on the Date of the Incident, (3) SMART's Third Party Claims Administrator Contacted Plaintiff After the Incident and Took a Recorded Statement, and (4) Plaintiff Filed an Application for No-Fault Benefits with SMART's Third Party Claims Administrator Less Than Thirty Days After the Incident, Providing a Written Description of the Incident and Plaintiff's Injuries

Defendant SMART maintains that Plaintiff's negligence claim is barred because Plaintiff did not serve SMART with written notice of a third-party claim within 60 days of the incident pursuant to MCL 124.419.

MCL 124.419 authorizes an action against the transportation authority, providing, in pertinent part, as follows:

> All claims that may arise in connection with the transportation authority shall be presented as ordinary claims against a common carrier of passengers for hire: Provided, That written notice of any claim based upon injury to persons or property shall be served upon the authority no later than 60 days from the occurrence through which such injury is sustained . . .

A. History of Notice Provisions

Notice provisions first entered Michigan jurisprudence during the Gilded Age. The earliest cases interpreting notice provisions dealt exclusively with municipal provisions, appearing in city charters. For example, in 1878, § 25, chapter 4 of the city charter of Detroit required all claims against the city be presented to the council, and it provided that "it shall be a sufficient bar and answer to any action or proceeding, in any court, for the collection of any demand or claim against said city, that it has never been presented to the council for audit or allowance . . . " *City of*

Detroit v Mich Paving Co, 38 Mich 358 (1878). The *Mich Paving* Court opined on the purpose of the charter provision as follows:

> The statute designs, as far as possible, to avoid the bringing of lawsuits, and to require an attempt to settle as a condition precedent to suing. ...if claims can be put in suit without an opportunity given to the council to look into the facts, it would not be impossible or improbable that defenses which might have been well known to some members of the council, or within their reach at the time the claim accrued, might not be known or made available by those conducting the defense. [*Id.*]

More than 100 years ago, this Court concluded that substantial compliance with statutory notice requirements will not preclude a plaintiff from maintaining a cause of action. *Brown v City of Owosso*, 126 Mich 91, 94-95; 85 NW 256 (1901). In *Brown,* the Court held that substantial compliance with the statute's requirements of descriptions of the defect and injuries sustained was sufficient, noting, "This notice is not a pleading, and we are of the opinion that the requirement should not receive so strict a construction as to make it difficult for the average citizen to draw a good notice, especially in view of the evident intention that a substantial statement should be sufficient, and the serious consequences of reliance upon a defective notice until after the expiration of the 60-day period." *Id.* at 94-95.

In 1908, this Court reiterated that substantial compliance with a statutory notice provision is sufficient to maintain a cause of action:

> We have been inclined to favor a liberal construction of statutes requiring notice of claims, and have not denied relief when by any reasonable interpretation the notice could be said to be in substantial compliance with statute. [*Ridgeway v Escanaba*, 154 Mich 68, 70; 117 NW 550 (1908).]

The *Ridgeway* Court recognized the legislative purpose of statutory notice provisions as follows:

> We must say that the legislature intended to give to defendants in such cases some protection against unjust raids upon their treasuries by unscrupulous prosecution of trumped-up, exaggerated, and stale claims, by requiring a claimant to give definite information to the city or village against whom it is asserted, at a time when the

> matter is fresh, conditions unchanged, and witnesses thereto and to the accident within reach. It is a just law, necessary to the protection of the taxpayer, who bears the burden of unjust judgments. It requires only ordinary knowledge and diligence on the part of the injured and his counsel, and there is no reason for relieving them from the requirements of this statute that would not be applicable to any other statute of limitation. [*Ridgeway*, 154 Mich at 72-73.]

Subsequently, in *Gable v City of Detroit*, 226 Mich 261; 197 NW 369 (1924), this Court confirmed its commitment to the doctrine of substantial compliance with statutory notice provisions. In *Gable*, the plaintiff did not mail a written notice to the City but, rather, went in person to the city clerk's office where she gave an oral statement, which was written up by the clerk and signed by the plaintiff. The City Clerk forwarded the notice to corporation counsel. *Id.* at 263-264. The *Gable* Court concluded that the plaintiff had given sufficient notice, explaining:

> We think there was a substantial compliance with the charter provision. The fact that the notice was addressed to the common council is unimportant; **that the notice was served on the corporation counsel by an employé (sic.) in the city clerk's office instead of by plaintiff or her attorney is likewise unimportant.** [*Id.* at 264 (emphasis added).]

Thus, in *Gable,* the substantial compliance doctrine was extended beyond the contents of the notice to the identity of the party giving the notice itself.

This Court confirmed its continued adherence to the substantial compliance doctrine in *Meredith v City of Melvindale*, 381 Mich 572, 579-580; 165 NW2d 7 (1969) and, again, recognized the purpose of statutory notice provisions:

> "The purpose of the charter provision is to furnish the municipal authorities promptly with notice that a claim for damages is made, and advise them of the time, place, nature, and result of the alleged accident, and a sufficient statement of the main facts, together with names of witnesses, to direct them to the sources of information that they conveniently may make an investigation."
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> Our courts are inclined to favor a liberal construction of notice requirements so long as they tend in that direction and are not misleading.
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> This judicial policy favoring a liberal construction is based on the theory that the inexpert layman with a valid claim should not be penalized for some

> technical defect. . . . This Court is committed to the rule requiring only substantial compliance with the notice provisions of a statute or charter. [*Id.* at 579-580, quoting *Pearll v City of Bay City,* 174 Mich 643, 647, 140 NW 938 (1913) (citations omitted).]

The first time that this Court actually addressed the constitutionality of a statutory notice provision was in 1970, in *Grubaugh v City of St Johns*, 384 Mich 165; 180 NW2d 778 (1970), wherein this Court examined the 60-day notice provision of MCL 691.1404[1] when applied to a plaintiff rendered mentally or physically incapacitated by the alleged tortious act. *Id.* at 167. At the outset, the *Grubaugh* Court held that the plaintiff's personal injury claim constituted an accrued vested right entitled to protection against arbitrary interference under the due process and equal protection clauses. *Id.* at 174-175. With regard to due process, the *Grubaugh* Court stated:

> Under the statute a plaintiff could institute suit on the first or fifty-ninth day after the injury. To take away his cause of action on the sixty-first day because he could not meet the notice provisions of the act would deprive him of a vested right of action without due process of law. [*Id.* at 175.]

Noting the long acknowledged purpose of statutory notice provisions as discussed in *Pearll, supra*, the *Grubaugh* Court maintained that the original policy considerations had lost their validity:

> Even if we assume the above original policy considerations were once valid, today they have lost their validity and ceased to exist due to changed circumstances. In recent years most governmental units and agencies have purchased liability insurance as authorized by statute. In addition to insurance investigators, they have police departments and full-time attorneys at their disposal to promptly investigate the causes and effects of accidents occurring on streets and highways. As a result these units and agencies are better prepared to investigate and defend negligence suits than are most private tortfeasors to whom no special notice privileges have been granted by the legislature.
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> [We] condemn the purely capricious and arbitrary exercise of legislative power whereby a wrongful and highly injurious invasion of rights is sanctioned and the

[1] *Grubaugh* involved the 1964 version of MCL 691.1404, which only afforded a claimant 60 days in which to provide notice of a claim and did not provide any additional time for minors or legally incapacitated individuals.

> litigant who fails to submit the required notice of claim is stripped of all real remedy. [*Id.* at 176.]

The *Grubaugh* Court concluded that the 60-day notice provision of MCL 691.1404 violated due process when applied to a physically or mentally incapacitated person. *Id.* at 177.[2] The Court did not address the equal protection argument.

Adopting the reasoning set forth in *Grubaugh*, this Court also held that the statutory notice provisions in MCL 691.1404[3] violated due process, as applied to minors. *Reich v State Highway Dep't*, 386 Mich 617, 622; 194 NW2d 700 (1972). In addition, the *Reich* Court held that the 60-day notice provision was barred by the constitutional guarantees of equal protection, stating, in pertinent part, as follows:

> Just as the notice requirement by its operation divides the natural class of negligent tort-feasors, so too the natural class of victims of negligent conduct is also arbitrarily split into two subclasses: victims of governmental negligence who must meet the requirement, and victims of private negligence who are subject to no such requirement. Contrary to the legislature's intention to place victims of negligent conduct on equal footing, **the notice requirement acts as a special statute of limitations which arbitrarily bars the actions of the victims of governmental negligence after only 60 days.** The victims of private negligence are granted three years in which to bring their actions. Such arbitrary treatment clearly violates the equal protection guarantees of our State and Federal Constitutions. The notice provision is void and of no effect. [*Id.* at 623-24 (citations omitted) (emphasis added).]

Subsequently, in *Howell v Lazaruk*, 388 Mich 32; 199 NW2d 188 (1972), this Court examined the question of whether the Secretary of State's actual notice, through its agents and

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[2] Following this Court's decision in *Grubaugh*, the Legislature enacted PA 1970, No 155, which amended MCL 691.1404 to provide 120 days' time to provide notice and added a provision affording minors under the age of 21, as well as legally incapacitated persons, 180 days' time to provide notice. This provision was again amended in 1972 to reflect that the minority provision applied to those under the age of 18, as opposed to 21.

[3] Like *Grubaugh, Reich* involved the 1964 version of MCL 691.1404, which only afforded a claimant 60 days in which to provide notice of a claim and did not provide any additional time for minors or legally incapacitated individuals.

employees, of an automobile accident involving an uninsured vehicle obviates the need for a plaintiff to the Secretary of the State notice of an intent to file a claim, within one year of the accident, pursuant to the Motor Vehicle Accident Claims Act, MCL 257.1118. This Court once again reiterated that the purpose of a statutory notice provision is to provide the governmental agency with sufficient and timely information to permit prompt investigation and remedy. Specifically, this Court held that MCL 257.1118 was meant to afford the Secretary of State "an opportunity to investigate and preserve the evidence before the claim had become too stale, and to protect the Fund from possible spurious claims for which no defense could be made for want of timely notice and timely investigation." *Id.* at 44. The *Howell* Court concluded that the Secretary's received actual notice of the accident by virtue of a claim form filed by one of the passengers in the involved vehicle as well as through the State Police report, which was filed with the Secretary of State. The Court noted that, with all of the information available, the Secretary of State was afforded an opportunity to investigate the incident and, therefore, it was not prejudiced in any way.[4] *Id.* at 44-45. Accordingly, the *Howell* Court held, "Because of the remedial nature of this Act and because of the lack of prejudice to the defendant, we hold that plaintiffs' failure to file notice within the time required under MCLA § 257.1118; MSA §9.2818, is not a bar to recovery under the circumstances of this case." *Id.* at 45. Given this disposition, the *Howell* Court did not address the constitutional issues. *Id.* at 47.

Shortly thereafter, in *Carver v McKernan*, 390 Mich 96, 100; 211 NW2d 24 (1973), this Court examined whether MCL 257.1118 violated the due process and equal protection provisions of the Michigan and U.S. Constitutions. At the outset, the *Carver* Court stated its reluctance to

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[4] The plaintiffs argued that if the Secretary of State's office had investigated the incident with all of the information available to it, it would have discovered that the plaintiffs sustained injuries in the accident. *Id.* at 41.

enforce statutes that limit access to courts:

> [W]e acknowledge frankly that statutes which limit access to the courts by people seeking redress for wrongs are not looked upon with favor by us. We acquiesce in the enforcement of statutes of limitation when we are not persuaded that they unduly restrict such access, but **we look askance at devices such as notice requirements which have the effect of shortening the period of time set forth in such statutes.** [*Id.* at 99 (emphasis added).]

The *Carver* Court recognized that notice requirements are not necessarily unconstitutional if there is a legitimate purpose and the period is not unreasonably short. *Id.* at 100. Noting that the reasonableness of the period depends in part on the purpose served by the notice requirement, the *Carver* Court declined to hold that the six-month notice requirement of the act [5] was constitutionally defective and upheld the notice requirement on the sole basis that the failure to give notice within the prescribed time "may result in prejudice to the fund." *Id.* Accordingly, the *Carver* Court held that a claim against the fund could only be dismissed upon a showing of prejudice by failure to give the statutory notice. *Id.*

Thereafter, the *Carver* rationale was extended to the 120-day notice provision of the governmental liability act at MCL 691.1404. *Hobbs v Mich State Highway Dep't*, 398 Mich 90; 247 NW2d 754 (1976). Based on the rationale set forth in *Carver,* the *Hobbs* Court held, "[A]ctual prejudice to the state due to lack of notice within 120 days is the only legitimate purpose we can posit for this notice provision . . . ." *Id.* at 96.

Twenty years later, in *Brown v Manistee Co Rd Comm*, 452 Mich 354, 356; 550 NW2d 215 (1996), this Court specifically addressed whether *Hobbs* should be overturned. After due consideration, this Court retained *Hobbs'* interpretation of the 120-day requirement, concluding that the doctrine of stare decisis mandated its reaffirmance, as well as the Legislature's

[5] The time period of MCL 257.1118 considered in *Howell* was one year. However, the period was shortened to six months effective July 1, 1968.

acquiescence in the *Hobbs* decision for more than twenty years:

> With these principles in mind, we do not believe that *Hobbs* should be overruled. When this Court decided *Hobbs* in 1976, it carefully examined the notice provision and the reasons justifying it. In that case, this Court deliberately decided that actual prejudice to the governmental agency resulting from lack of notice within 120 days was the only legitimate purpose it could posit for the notice provision. Further, this Court deliberately decided that, unless actual prejudice is shown, the plaintiff's claim is not barred by failure to give notice within the requisite period.
>
> We are not convinced that *Hobbs* was wrongly decided. Further, we believe that more injury would result from overruling it than from following it. The rule in *Hobbs* has been an integral part of this state's governmental tort liability scheme for almost two decades. It should not be lightly discarded. Although the law of governmental tort liability in this state has changed over the years, the continued validity of the *Hobbs* rule will not result in injustice. Rather, a reaffirmance of the rule will maintain the uniformity, certainty, and stability in the law of this state. Further, we emphasize that the Legislature has not changed the language of § 4 since *Hobbs* was decided. [*Brown*, 452 Mich at 366-367.]

Eleven years later, in *Rowland,* a majority of four (Justices Taylor, Corrigan, Young and Markman) jettisoned the principle of *Hobbs* and *Brown*. The *Rowland* majority rejected the "actual prejudice" requirement based on the absence of any such language within the relevant statute, thereby requiring the statutory language to be enforced as written. *Id.* at 219. The *Rowland* majority recognized the purpose of statutory notice provisions as follows:

> [T]he Legislature had a rational basis for the notice requirements – the most obvious being facilitating meaningful investigations regarding the conditions at the time of the injury and allowing for quick repair so as to preclude other accidents . . .[*Rowland,* 477 Mich at 205.]

The *Rowland* majority further assumed that the Legislature's goal in drafting notice provisions "was to provide notice to facilitate investigation, claims resolution, and rapid road repairs, as well as the creation of reserves and the like for self-insured governmental entities." *Id.* at 25.

Nonetheless, the *Rowland* majority's rejection of the *Hobbs-Brown* "actual prejudice"

requirement does not affect the inquiry of whether an entity has received "notice" in accordance with the relevant statute. This Court has repeatedly reaffirmed that notice requirements are to be liberally construed in favor of the lay citizenry to allow suits to go forward to a decision on the substantive merits, so long as the notice substantially complies with the purpose to be served. *Brown,* 126 Mich at 94-95; *Ridgeway,* 154 Mich at 69-73; *Pearll*, 174 Mich at 647*; Gable v City of Detroit,* 226 Mich 261; 197 NW 369 (1924); *Hummel v City of Grand Rapids*, 319 Mich 616, 624-25; 30 NW2d 372 (1948); *Penix v City of St Johns*, 354 Mich 259, 261-62; 92 NW2d 332 (1958) (per Justices Dethmers, Carr and Kelly); *Swanson v City of Marquette*, 357 Mich 424, 431-32; 98 NW2d 574 (1959)*; Merideth*, 381 Mich at 579.

This construction of "notice" provisions has remained steady in Michigan law for over 100 years since *Brown* was decided. With this construction, this Court has recognized that a "notice," unlike a formal complaint, is typically provided by a layman without resort to law books or the guiding hand of counsel. This body of law strikes a fair balance between the legitimate interests of the government and the governed. It provides the governmental agency with sufficient and timely information to permit prompt investigation and remedy. At the same time, it permits the injured citizen to bring a claim and be heard when he has provided the information sought.

B. The Information Provided to SMART Satisfied the "Notice" Requirements of MCL 124.419.

MCL 124.419 does not contain any specific requirements of elements that must be included in the notice. Rather, it plainly and unambiguously requires only "written notice of any claim[.]" "Notice" is defined by Black's Law Dictionary as:

> 1. Legal notification required by law or agreement, or imparted by operation of law as a result of some fact (such as the recording of an instrument); definite legal cognizance, actual or constructive, of an existing right or title. . . . A person has notice of a fact or condition if that person (1) has actual knowledge of it; (2) has received information about it; (3) has reason to know about it; (4) knows about a

related fact; or (5) is considered as having been able to ascertain it by checking an official filing or recording. **2.** The condition of being so notified, whether or not actual awareness exists. . . . **3.** A written or printed announcement. [Black's Law Dictionary (8th ed).]

As the Court of Appeals' panel recognized in this matter on page two of its opinion, this Court has defined a "claim" as:

> **1.** The aggregate of operative facts giving rise to a right enforceable by a court. . . . **2.** The assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional. . . . **3.** A demand for money or property to which one asserts a right.... [*CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 554-555; 640 NW2d 256 (2002), quoting Black's Law Dictionary (7th ed).]

The Court of Appeals panel further referred to this Court's opinions in *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 100; 718 NW2d 784 (2006) (Cavanagh, J, dissenting) (summarizing the Court's historical treatment of "claim" and concluding, "In short, then, a claim means a 'demand[] of a pecuniary nature,' a 'right to payment,' and a 'demand for money'"); *Central Wholesale Co v Chesapeake & O R Co,* 366 Mich 138, 149; 114 NW2d 221 (1962) (""Claim" is defined to be "a demand of a right or alleged right; a calling on another for something due or asserted to be due; as, a claim of wages for services." Century Dictionary'" (quoting *Allen v Bd of State Auditors*, 122 Mich 324, 328; 81 NW 113 (1899)).

As the Court of Appeals' panel appropriately held on page two of its opinion in this matter:

> The statute does not require any specific information, as long as the defendant has notice of a "claim": i.e., notice of the aggregate of operative facts giving rise to an enforceable right or notice of a demand for payment. Moreover, in general, substantial compliance may be sufficient to satisfy a statutory notice provision. *Meredith v Melvindale*, 381 Mich 572, 579-580; 165 NW2d 7 (1969); *Mullas v Secretary of State*, 32 Mich App 693, 697-698; 189 NW2d 141 (1971)."Although mandatory notice provisions cannot be ignored . . . substantial compliance is sufficient." *Livonia v Dep't of Social Services*, 423 Mich 466, 513; 378 NW2d 402 (1985) (citation omitted).
>
> Here, defendant had timely notice of an accident between two buses. The only vehicles involved in the accident were owned by defendant, and plaintiff was a

> passenger on one of the vehicles. Defendant also had timely notice that plaintiff was injured, and it knew that, 60 days after the accident, she continued to require medical treatment, provision of household services, and restriction from work. While plaintiff had no proof that she had suffered permanent disfigurement or serious impairment of body function, by the expiration of the 60-day period, **defendant had notice of the operative facts needed to anticipate plaintiff's tort claim, and plaintiff had demanded payment for her injuries**. **The statute does not require a defendant to know what legal theory a plaintiff will pursue, only that it have notice of facts giving rise to a right to seek damages or payment**. Therefore, we hold that the information defendant had before the expiration of the 60-day period was sufficient to provide written notice of plaintiff's third-party claim. [Slip Opinion, p 2 (emphasis added).]

SMART argues that in order to satisfy the "written notice of any claim" requirement of MCL 124.419, SMART must have known that the plaintiff intended to sue in tort for injuries sustained. SMART asserts that the application for no-fault benefits was insufficient notice because it only provided notice of a claim for no-fault benefits. Contrary to SMART's assertions, MCL 124.419 simply requires notice of "*any* claim" – it does not require the claimant to allege and affirmatively prove all of the elements necessary to establish tort liability. Based on the definition of the word "claim," the plaintiff's duty to provide "written notice of any claim" simply encompassed the duty to notify the transportation authority of the "operative facts giving rise to a right enforceable by a court." The plain language of the statute does not require a claimant to explicitly inform the transportation authority that he or she intends to take legal action or pursue a specific avenue of recovery. To regard the 60-day notice period as a period in which the decision to sue must be made is to ignore that the applicable statute of limitations provides three years to make and effectuate that decision.

In this case, **SMART admits that it had actual knowledge of the incident and that its employee was present when the injuries occurred.** This Court has recognized that knowledge of an accident is the equivalent of notice. See *Henderson v Consumers Power Co,* 301 Mich 564, 574-75; 4 NW2d 10 (1942) (company has "notice" of accident and injury when its employees

visited the plaintiff while he was confined due to his injury). Clearly, SMART had Ms. Atkins' identifying information and knew that she was injured since SMART's third party claims administrator contacted her after the incident. All of this information combined provided legally sufficient notice of the aggregate of operative facts giving rise to a right enforceable by a court.

This Court has continuously held that the purpose of "notice" statutes (without regard to whether it requires notice of the "claim" or the "occurrence") is to afford an opportunity to investigate a claim and to determine whether there is any possible liability, at a time when the matter is fresh, conditions are unchanged, and witnesses are available. SMART clearly had notice of Plaintiff's injuries well within the 60 day statutory period and, in keeping with the legislative scheme, SMART had all of the information necessary to facilitate its investigation. It could have investigated "the incidents attending the accident while the occurrence [was] fresh in the minds of those who possess information on the subject." (*Green, supra*). The information was sufficient to "direct [SMART] to the sources of information that they conveniently may make an investigation." (*Meredith/Pearl, supra*). Whether SMART ***chose*** to investigate the incident after it received notice of it, or whether Plaintiff intended to pursue an action for his personal injuries, is of no relevance to the sufficiency of the notice that SMART received on the date of the incident.

Beyond any real doubt, Plaintiff satisfied the statutory requirements as to the timing of information, the responsible governmental agency as recipient, the type of information, as well as the very purpose of notice. This Court's precedent establishes that suit may proceed if the "notice" provided meets the timing and content requirements that accomplish the statutory purpose. To deny Plaintiff an opportunity to maintain a legal action for the serious injuries that she sustained as a result of Defendant's employee's negligence based on an unduly restrictive interpretation of "notice" under MCL 124.419 that ignores the fact that Defendant had actual notice of the accident

and injuries at the time of the occurrence, exalts form over substance and unjustly prejudices an individual legitimately entitled to pursue a legal action.

The law in Michigan is replete with instances where appellate courts were simply unwilling to subjugate form in favor of substance to sanction an unjust result. See e.g., *Potter v McLeary,* 484 Mich 397, 423; 774 NW2d 1(2009) (concluding that dismissal of a medical malpractice action with prejudice for failure to assert legal theory of vicarious liability in a NOI where the NOI adequately set forth the claim against the agent or employee "exalts form over substance in an intolerable manner"); *Zwiers v Growney*, 286 Mich App 38, 52; 778 NW2d 81 (2009) (concluding that dismissal of a medical malpractice action filed before the expiration of the 182-day notice period would place form over substance because defendant's substantial rights were not affected and the legislative purpose of the notice statute was not defeated); *Esselman v Garden City Hosp*, 284 Mich App 209, 222; 772 NW2d 438 (2009) (refusing to hold that lack of specificity in some sections of affidavits of merit rendered the affidavits deficient because to do so "would be to exalt form over substance"); *Cain v Waste Mgmt Inc*, 259 Mich App 350, 367; 674 NW2d 383 (2003) (refusing to interpret a statute in a manner that would produce unfair results and would exalt form over substance); *Westfield Companies v Grand Valley Health Plan*, 224 Mich App 385, 389-90; 568 NW2d 854 (1997) (where the court refused to "put[ ] form over substance" to deny coverage under a contract).

In short, the information provided to SMART satisfied the "notice" requirements of MCL 124.419 and no further inquiry is necessary.

III. In the Event that this Court Concludes that the 60-Day Notice Provision in MCL 124.419 was Not Satisfied, This Court Should Reconsider *Rowland v Washtenaw County Road Commission*, 477 Mich 197 (2007) and Reverse the Court of Appeals' Judgment in Favor of Defendant in this Matter on the Ground that Defendant Has Not Alleged or Shown Any Prejudice From the Manner or Time of Notice.

In *Trent v Smart*, 252 Mich App 247 (2002), the Court of Appeals extended the "actual prejudice" requirement to the 60-day notice provision at issue in MCL 124.419. In *Trent,* the plaintiff alleged that SMART and its driver was liable for injuries she sustained as a passenger on one its busses. The bus driver and SMART argued that MCL 124.419 barred the plaintiff's claim because she failed to notify them of her claim within sixty days of the accident. In response, the plaintiff argued, in pertinent part, that the statutory notice provision was unconstitutional and that the defendants waived compliance with the statute by failing to show prejudice. The trial court rejected the plaintiff's arguments, reasoning that there was a rational basis for the notice provision and that there is no requirement in the statute that defendants show prejudice from the failure to give timely notice. On appeal, the Court of Appeals declined to reach the constitutional issue and, instead, relying on *Hobbs* and *Brown,* held that the failure to comply with the statutory 60-day notice provision was not fatal, unless SMART could demonstrate that it suffered actual prejudice from plaintiff's failure to provide timely notice. *Id.* at 253.

However, in 2006, the *Rowland* majority overruled three decades of settled law, including *Brown* and *Hobbs,* and rejected the "actual prejudice" requirement based on the absence of any such language within MCL 691.1404. In holding that MCL 691.1404 must be strictly "enforced as written" with no exceptions, the *Rowland* majority also overruled nearly a century-long aversion to strict construction of notice provisions and well settled law giving liberal construction to MCL 691.1404.

A. *Rowland* Was Wrongly Decided and Stare Decisis Considerations Do Not Support Retaining It.

In *Rowland,* Justices Kelly, Weaver and Cavanagh dissented in part, deeming the notice at issue deficient and concluded that *Hobbs* and *Brown* should not have been overturned. *Id.* at 247-266. Justice Kelly stated in her dissenting opinion, in pertinent part, as follows:

> Together, these cases represent 30 years of precedent on the proper meaning and application of MCL 691.1404. Such a considerable history cannot be lightly ignored. And the Legislature's failure to amend the statute during this time strongly indicates that *Hobbs* and *Brown* properly effectuated its intent when enacting MCL 691.1404(1).
>
> [I]n both *Hobbs* and *Brown*, the Court identified the intent behind the notice provision as being to prevent prejudice to a governmental agency. "[A]ctual prejudice to the state due to lack of notice within 120 days is the only legitimate purpose we can posit for this notice provision. . . ." For 20 years, the Legislature knew of this interpretation but took no action to amend the statute or to state some other purpose behind MCL 691.1404(1). The Court then readdressed the statute in *Brown* and came to the same conclusion regarding the purpose behind MCL 691.1404(1).
>
> Another ten years have passed, but still the Legislature has taken no action to alter the Court's interpretation of the intent behind the statute. This lack of legislative correction points tellingly to the conclusion that this Court properly determined and effectuated the intent behind MCL 691.1404(1). If the proper intent is effectuated, the primary goal of statutory interpretation is achieved. [*Rowland,* 477Mich at 258-59 (Kelly, dissenting) (citations omitted).]

Similarly, Justice Cavanagh stated in his dissenting opinion, in pertinent part, as follows:

> A majority of this Court considered this very issue 11 years ago and concluded that *Hobbs* was not wrongly decided. I continue to agree with the conclusion reached in *Brown*. These cases are part of a 30-year-old line of decisions. The line of cases preceding *Hobbs* and *Brown* provide the proper context in which to evaluate them.
>
> The cases leading up to *Hobbs* and *Brown* represent thoughtfully made, deliberate decisions.
>
> * * * *
>
> The validity of the *Hobbs* and *Brown* decisions must be evaluated in view of our earlier constitutional rulings in *Grubaugh, Reich, and Carver*. With due consideration of this Court's precedent in the area of government notice provisions, the *Hobbs* Court made a reasoned decision that the 120-day notice provision might be unconstitutional if dismissal did not serve the posited purpose of avoiding

prejudice.

* * * *

> The *Hobbs* decision did not foreclose the possibility that the notice provision served other legitimate state interests other than prejudice; it merely stated that this Court could only posit one purpose. If the Legislature had responded in any way to our inference, we would have had reason to reevaluate the constitutionality of MCL 691.1404 in light of the Legislature's action. [*Rowland*, 477Mich at 271-72, 275, 276 (Cavanagh, dissenting) (citations omitted).]

Amicus maintains that *Rowland* was wrongly decided and suggests that the *Hobbs-Brown* view, rather than the *Rowland* majority view, presents the better rule of law. The *Hobbs-Brown* view is consistent with more than 30 years' of precedent in the area of government notice provisions. Further, the *Hobbs-Brown* approach serves the principle that statutes are to be construed so as to avoid the need to reach constitutional questions. *United States v Harriss*, 347 US 612, 618 (1954); *J & J Constr Co v Bricklayers & Allied Craftsmen, Local 1*, 468 Mich 722, 734; 664 NW2d 728 (2003); *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993).

Indeed, despite the fact that a previous decision was wrongly decided, this Court must be mindful of the doctrine of stare decisis when deciding whether to overrule it, with the presumption that upholding precedent is the preferred course of action. *Petersen v Magna Corp*, 484 Mich 300, 317; 773 NW2d 564 (2009) (opinion by Kelly, C.J.). "[S]tare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v Hallock*, 309 US 106,119 (1940) (Powell, J., concurring). Nonetheless, when analyzing precedent that itself represents a recent departure from established caselaw, courts apply a decreased presumption in favor of upholding precedent. *Adarand Constructors, Inc v Pena*, 515 US 200, 233-234 (1995).

This Court has acknowledged that there are numerous criteria to consider in determining

whether there is justification to overturn precedent:

> In determining whether a compelling justification exists to overturn precedent, the Court may consider numerous evaluative criteria, none of which, standing alone, is dispositive. Historically, courts have considered (1) whether the precedent has proved to be intolerable because it defies practical workability, (2) whether reliance on it is such that overruling it would cause a special hardship and inequity, (3) whether related principles of law have so far developed since the precedent was pronounced that no more than a remnant of it has survived, (4) whether facts and circumstances have so changed, or come to be seen so differently, as to have robbed the precedent of significant application or justification, (5) whether other jurisdictions have decided similar issues in a different manner, (6) whether upholding the precedent is likely to result in serious detriment prejudicial to public interests, and (7) whether the prior decision was an abrupt and largely unexplained departure from then existing precedent. [*Regents of Univ of Michigan v Titan Ins Co,* 487 Mich 289, 303-304; 791 NW2d 897 (2010).]

Many of the above factors provide justification for overturning *Rowland;* however, Amicus suggests that the most compelling factor is that *Rowland* was such "an abrupt and largely unexplained departure from then existing precedent." As the history of statutory notice provisions in Michigan's jurisprudence makes clear, *Rowland* collides with the prior doctrine of liberal construction and substantial compliance in place for more than a century, and prejudice requirements in place for more than 30 years. While the *Rowland* majority relied upon the supposedly "settled" nature of the law enforcing notice provisions strictly as written prior to *Reich*, the fact of the matter is that this Court's treatment of notice provisions over the last century reflects an ideology that notice provisions are elastic concepts, characterized by liberal construction, doctrines of waiver and substantial compliance. Further, for the three decades preceding *Rowland,* statutory notice provisions were considered unconstitutional when applied to cases where the governmental entity was not prejudiced by the failure to give timely notice. "To be sure, stare decisis promotes the important considerations of consistency and predictability in judicial decisions and represents a wise and appropriate policy in most instances." *Mitchell v W T Grant Co*, 416 US 600, 627 (1974). However, where the reasoning or understanding of constitutional

issues is presented, "it is not only [the court's] prerogative but also [its] duty to re-examine a precedent." *Id.* at 627-28.

B. The "Actual Prejudice" Requirement is Consistent with the Purpose of Statutory Notice Provisions.

Additionally, MCL 124.419 does not express a remedy or penalty for non-compliance.[6] It does not, by its own terms, mandate dismissal as the consequence of non-compliance or imperfect compliance. Under the circumstances, a remedy should be imposed that is consistent with the purpose meant to be served by the statutory notice provision. In comparable contexts, Michigan Appellate Courts have declined to impose a rule of automatic loss of the case, but have instead embraced a more flexible approach that considers prejudice. See e.g., *Bush v Shabahang,* 484 Mich 156; 772 NW2d 272 (2009) (filing of a defective notice of intent by medical malpractice plaintiff does not require dismissal with prejudice and plaintiff may be afforded an opportunity to amend); *Kirkaldy v Rim*, 478 Mich 581; 734 NW2d 201 (2007) (filing of a defective affidavit of merit by a medical malpractice plaintiff will result in tolling of the statute of limitations and dismissal without prejudice, thereby preserving plaintiff's opportunity to re-file complaint with a conforming affidavit of merit); *People v Anstey,* 476 Mich 436; 719 NW2d 579 (2006) (violation of MCL 257.625(6)(d), entitling a person arrested for operating under the influence to obtain an independent blood alcohol test, does not require dismissal of charges); *Kowalski v Fiutowski*, 247

[6] Compare MCL 691.1404 and 691.1406, which state, "As a condition to any recovery," the required notice must be given. See also MCL 600.6431, which states, "No claim may be maintained against the state unless" the required notice is given. See also MCL 600.2912b(1), which provides that "a person shall not commence an action . . . unless" the required notice of intent is given. See also MCL 257.1118, which states that "recovery from the fund shall not be allowed in any event unless" the required notice is given. See also MCL 102.1, which states, "No city subject to the provisions of this act shall be liable in damages sustained by any person unless" the required notice is given. See also MCL 418.381, which states, "A proceeding for compensation for an injury under this act shall not be maintained unless" the required notice is given.

Mich App 156; 635 NW2d 502 (2001) (failure of medical malpractice defendant to file an affidavit of meritorious defense within the deadline established by MCL 600.2912e does not require a default judgment).

As set forth above, the notice statutes are intended to provide the governmental agency with sufficient and timely information so that the agency has an opportunity to investigate while the evidence it needs is still available. If a defendant is provided with sufficient information (or its representative is actually present at the accident and has the opportunity to obtain information) in a timely manner to enable it to investigate the potential claim, the purpose of the notice statute has been served. Conversely, dismissal of a plaintiff's action when (a) the statute does not specify dismissal and (b) the defendant has all of the information it needs to conduct an investigation with regard to a potential claim, would inappropriately substitute the Court's will for the Legislature's purpose. Courts may not substitute their judgment for that of the legislature. *Kull v Michigan State Apple Commission*, 296 Mich 262, 267; 296 NW 250 (1941); *City of Ecorse v Peoples Community Hosp Auth,* 336 Mich 490, 500; 58 NW2d 159 (1953).

If the Legislature intended the notice provision to serve a purpose other than to avoid prejudice to the transportation authority, it could have written it into the statute. If the Legislature intended that the 60-day notice period to be a hard and fast limit, irrespective of the 3-year statute of limitations, it could have written it into the statute. If the Legislature intended to preclude a claimant from bringing a cause of action where the transportation authority had actual notice of the incident and injury and an opportunity to investigate, but the claimant did not give separate written notice of the injury himself or herself, the Legislature could have written it into the statute. The Legislature has shown that it knows how to use clear wording when it intends that a notice meet

specific requirements,[7] and it certainly could have used specific wording in MCL 124.419 if it intended the harsh interpretation and results that Defendant suggests.

Under the *Hobbs-Brown* approach, Plaintiff's failure to comply with the 60-day notice provision is only fatal if SMART has suffered actual prejudice from Plaintiff's failure to provide timely notice. "Prejudice refers to 'a matter which would prevent a party from having a fair trial, or matter which he could not properly contest.' " *Blohm v Emmet Co Bd of Co Rd Comm'rs*, 223 Mich App 383, 388; 565 NW2d 924 (1997) (citations omitted). Here, SMART has failed to establish that it was actually prejudiced by the failure of plaintiff to specify that she intended to pursue a tort claim for damages, especially since SMART admits that it had actual notice of the incident. Further, Plaintiff's action was commenced less than one year after the accident, which was well within the three-year limitations period. Thus, SMART had ample opportunity to investigate the claim while it was still fresh and cannot establish that it suffered actual prejudice in this matter.

IV. Alternatively, *Rowland's* Application Should be Limited to the Notice Provision for the Highway Exception to Governmental Immunity Set Forth in MCL 691.1404(1).

Alternatively, Amicus maintains that *Rowland* is distinguishable and it should not dictate the outcome in this matter. Unlike the case at bar, *Rowland* involved governmental liability for injuries resulting from highway defects, under a statutory provision in the Government Tort Liability Act ("GTLA"), MCL 691.1401 et seq.

This Court has recognized the limited applicability of *Rowland* in denying leave in a similar case involving a notice provision outside of the GTLA. See *Beasley v State of Michigan*, 483 Mich 1025; 765 NW2d 608 (2009). In *Beasley,* the plaintiff was injured in an automobile accident involving a state-owned vehicle driven by a state employee. The employee reported the

[7] See e.g., MCL 600.2912b, MCL 600.6431.

accident to the state, which assigned the matter to its contractual insurance administrator. The insurance administrator obtained information from plaintiff about the accident and his injuries. After several months of correspondence exchange, the insurance administrator advised plaintiff's attorney that the state would not settle. Thereafter, the plaintiff sued the driver and the state. The state sought summary disposition, relying on *Rowland,* claiming that plaintiff had failed to comply with the six-month notice requirement of MCL 600.6431(3). The state contended that the reasoning in *Rowland* was directly applicable to the plaintiff's claim in *Beasley.* The Court of Claims denied the state's motion. Both the Court of Appeals and this Court denied leave to appeal. Notably, Chief Justice Marilyn Kelly concurred in the decision to deny leave and specifically rejected defendant's arguments that *Rowland* was applicable:

> [I]t is not. *Rowland* interpreted the notice provision of MCL 691.1404(1). This case is governed by an entirely different provision – MCL 600.6431(3). Therefore, although *Rowland* may be similar to this case, it is distinguishable. ***Rowland* does not dictate the outcome here because it involves a different statutory provision**. [*Beasley,* 483 Mich at 1025 (emphasis added).]

In response to Justice Corrigan's dissent, in which she argued that the denial of leave in *Beasley* ignored precedent, Justice Kelly stated:

> Justice Corrigan would prefer that the Court extend precedent to facts and circumstances that the precedent does not reach.
>
> * * * *
>
> unless this case involves MCL 691.1404(1), which it most clearly does not, our decision to deny leave to appeal is not an "apparent detour [] from stare decisis." [*Beasley,* 483 Mich at 1027, n.13]

Similarly, this Court declined to extend *Rowland* to the statute at issue in *Chambers v Wayne Co Airport Authority*, 483 Mich 1081; 765 NW2d 890 (2009), which involved the interpretation of MCL 691.1406. As Chief Justice Kelly explained in her concurring opinion in *Potter v McLeary*, 484 Mich 397; 774 NW2d 1(2009), "[T]he cases dealt with different statutory provisions and the Court was not bound to extend *Rowland* to the statute at issue in *Chambers.*" *Id.*

at 428-29 (Kelly, CJ, concurring).

Amicus submits that this Court's order in *Chambers* impacts the Court of Appeals' analysis in the instant matter. In *Chambers,* the plaintiff alleged that he fell in a puddle of water at the Wayne County Airport. An officer with the Wayne County Airport Authority wrote up an incident report after the fall. The report included statements and observations from witnesses, as well as the officer himself. The officer notified a Wayne County Operations Agent of the incident and of the leaking ceilings that he observed. Defendant sought summary disposition on the grounds that the plaintiff did not provide notice of the occurrence within 120 days as required by MCL 691.1406. The trial court held that the incident report was sufficient to satisfy the statutory notice requirements. The Court of Appeals agreed in a 2-1 unpublished decision (Davis, Beckering, JJ; Murray, dissenting), holding, in pertinent part, as follows:

> Our Supreme Court has construed a failure to satisfy the substantially identical notice requirement in MCL 691.1404(1) as a strict bar to suit irrespective of whether the governmental agency suffers any actual prejudice as a result. *Rowland*, supra at 219-223. In addition to being substantively identical, both provisions are part of the governmental tort liability act, MCL 691.1401 et seq, and they should therefore be interpreted identically. *Empire Mining Partnership v Orhanen*, 455 Mich 410, 426 n 16; 565 NW2d 844 (1997).
>
> However, it has nevertheless long been the case in Michigan that "notice," particularly where demanded of an average citizen for the benefit of a governmental entity, need only be understandable and sufficient to bring to the defendant's attention the important facts. *Brown v City of Owosso*, 126 Mich 91, 94-95; 85 NW 256 (1901). The notice itself, therefore, should be liberally construed in favor of "the inexpert layman with a valid claim" who "should not be penalized for some technical defect." *Meredith v City of Melvindale*, 381 Mich 572, 579; 165 NW2d 7 (1969). What constitutes "a notice" is not, in fact, defined in the governmental tort liability act. MCL 24.205(4), MCL 462.107(3), and MCL 565.802(I) define the term in various ways that do not seem relevant except insofar as they are consistent with the dictionary definitions, all of which pertain to bringing knowledge to the attention of another. Thus, plaintiff contends that the incident report – taken by defendant's employee and indicating on its face that the pertinent facts were reported upward in defendant's chain of management – constitutes sufficient and timely notice. The trial court agreed, and, given the context above, so do we. [*Chambers v Wayne Co Airport Auth*, unpublished

opinion per curiam of the Court of Appeals, issued June 5, 2008 (Docket No. 277900), rev'd 482 Mich 1136 (2008), on reconsideration, earlier order vacated, lv app den 483 Mich 1081 (2009).]

On December 19, 2008, this Court reversed the judgment of the Court of Appeals, in lieu of granting leave to appeal, and remanded the matter to the Wayne County Circuit Court for entry of an order of judgment for the defendant. However, on June 12, 2009, this Court granted reconsideration, vacated the December 19, 2008 order and denied the application for leave to appeal the judgment of the Court of Appeals. Indeed, "nothing of precedential significance should be deduced from an order of [the Supreme] Court denying leave [to appeal]." *Forton v Laszar*, 463 Mich 969, 971; 622 NW2d 61 (2001) (Kelly, J., concurring), citing *Tebo v Havlik*, 418 Mich 350, 363, n.2; 343 NW2d 181 (1984); see also MCR 7.321. However, if the Court of Appeals' decision in *Chambers* contravened Supreme Court precedent (*Rowland*), then it is doubtful that this would have granted reconsideration and affirmed the Court of Appeals' judgment. As Chief Justice Kelly stated in *Beasley,* this Court will not extend precedent to facts and circumstances that the precedent does not reach. *Beasley,* 483 Mich at 1027. Moreover, as Chief Justice Kelly later explained, *Rowland* and *Chambers* "dealt with different statutory provisions and the Court was not bound to extend *Rowland* to the statute at issue in *Chambers*." *Potter,* 484 Mich at 428-29 (Kelly, CJ, concurring).

Significantly, the statutory notice provision at issue in *Rowland* (MCL 691.1404) affords a claimant 120 days to give notice to the governmental agency – twice the amount of time that a claimant is afforded to give notice under MCL 124.419. In 1970, the Legislature amended MCL 691.1404 to increase the notice period from 60 days to 120 days. In addition, the Legislature added a provision affording minors 180 days from the time of the injury in which to provide notice and further provided that such notice could be given by a parent, attorney, next friend or legally appointed guardian. The Legislature also added a provision allowing legally incapacitated persons to file notice within 180 days after the termination of the disability. Given the significant differences in the statutory notice provisions, *Rowland* should be limited to claims involving MCL 691.1404 only.

More importantly, *Rowland* addressed a notice that was given ***after*** the statutory period for notice had elapsed. In the present case, SMART does not dispute that it had notice of the incident well within the statutory period; rather, the only issue is whether the notice met the statutory requirements. *Rowland* should not be extended beyond its facts.

V. Alternatively, There Are Substantial Constitutional Questions Posed by a 60-Day "Notice" Provision Which Abolishes a Substantively Meritorious Cause of Action If Prejudice Is Not Considered.

Amicus acknowledges that "it is an undisputed principle of judicial review that questions of constitutionality should not be decided if the case may be disposed of on other grounds." *J & J Constr Co*, 468 Mich at 734. The *Hobbs-Brown* approach serves the principle that statutes are to be construed so as to avoid the need to reach constitutional questions. Nevertheless, in the event that this Court rejects the *Hobbs-Brown* approach, Amicus suggests that there are substantial constitutional questions posed by a 60-ay day "notice" provision which abolishes a substantively meritorious cause of action if prejudice is not considered.

Amicus maintains that the 60-day notice provision of MCL 124.419 is unreasonable. In *Carver*, *supra*, the Court held that a notice provision with a legitimate purpose "does not necessarily violate the constitution." 390 Mich at 100. The Court held, however, that "even though some notice requirement may be permitted, a particular provision may still be constitutionally deficient." *Id.* The Court also noted that a particular notice provision may be unreasonable if "the time specified in the notice [provision is] for an extremely short period . . . ." *Id.* The *Carver* Court upheld the 6-month notice period at issue in that matter, concluding that it provided a claimant sufficient time to serve the governmental agency with notice of an alleged injury and corresponding defect.

However, the 60-day notice provision at issue in this matter is far shorter than the 120-day period upheld in *Hobbs* and *Brown* or 6-month period upheld in *Carver.* As *Reich* and *Hobbs* suggest, there are substantial constitutional questions posed by a 60-day "notice" provision which abolishes a substantively meritorious cause of action, with a deadline far shorter than any statute of limitations (about 1/18 as long as the three-year period applicable to other tortfeasors) if, by hypotheses, prejudice is not considered.

The equal protection clauses of the Michigan and the federal constitutions require that no person be denied the equal protection of the law. See Const 1963, art 1, § 2; US Const, Am XIV. See also *Frame v Nehls*, 452 Mich 171, 183; 550 NW2d 739 (1996); *Spada v Pauley*, 149 Mich App 196, 203; 385 NW2d 746 (1986). This Court has found Michigan's equal protection provision coextensive with the Equal Protection Clause of the federal constitution. *Crego v Coleman*, 463 Mich 248, 258; 615 NW2d 218 (2000). This constitutional guarantee requires that persons similarly situated be treated alike and protects persons from being treated differently on account of characteristics that do not justify such disparate treatment. *FS Royster Guano Co v Virginia*, 253

US 412, 415 (1920); *Crego*, 463 Mich at 258;*El Souri v Dep't of Social Services*, 429 Mich 203, 207; 414 NW2d 679 (1987).

As this Court has stated:

> When a party raises a viable equal protection challenge, the court is required to apply one of three traditional levels of review, depending on the nature of the alleged classification. The highest level of review, or "strict scrutiny," is invoked where the law results in classifications based on "suspect" factors such as race, national origin, or ethnicity . . . . Absent the implication of these highly suspect categories, an equal protection challenge requires either rational-basis review or an intermediate, "heightened scrutiny" review. [*Crego,* 463 Mich at 259 (citations omitted).]

Here, none of the factors invoking "strict scrutiny" review are implicated; therefore, a rational-basis review is required. As this Court has stated:

> Under rational-basis review, courts will uphold legislation as long as that legislation is rationally related to a legitimate government purpose. To prevail under this highly deferential standard of review, a challenger must show that the legislation is "arbitrary and wholly unrelated in a rational way to the objective of the statute." A classification reviewed on this basis passes constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable. Rational-basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with "mathematical nicety," or even whether it results in some inequity when put into practice. Rather, the statute is presumed constitutional, and the party challenging it bears a heavy burden of rebutting that presumption. [*Id.* at 259-60 (citations omitted).]

In overruling several decades of settled law, and nearly a century of commitment to the liberal construction of notice provisions, the *Rowland* majority gave short shrift to the equal protection arguments, citing several possible legislative purposes that it considered "legitimate" without an ounce of discussion whether these possible legislative purposes allowed MCL 691.1404 to "pass constitutional muster." In fact, the *Rowland* majority failed explain how the 120-day notice provision was rationally related to its proffered legislative purposes.

Amicus suggests that the Iowa Supreme Court's discussion of similarly proffered

legislative purposes is instructive on this issue. Specifically, in *Miller v Boone County Hosp,* 394 NW2d 776 (Iowa 1986), the Iowa Supreme Court examined these same legislative purposes and thoughtfully analyzed each supposed purpose, and its relationship, rational or otherwise, to a 60-day statutory notice provision:[8]

> (1). Stale claims. While local governments may have broad exposure, that of certain private persons or entities may be even greater. The general statute of limitations would protect local governments from stale claims in the same manner as it protects the private sector. The odds may even be in favor of local governments, who have police departments, attorneys and other personnel at their disposal to investigate the causes and effects of accidents. And, because plaintiffs bear the burden to prove negligence, any difficulty in proof in cases arising after sixty days would beset them as well as defendants.
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> (2). Planning of budgets. Local governments "rarely budget for claims but carry liability insurance as the statutes permit. . . ." Insurance is usually purchased because local governments, comprising small populations, are unable to use actuarial methods to forecast liabilities and to self-insure. The public policy of the Victorian age, which frowned on the idea of insurance, no longer exists. The legislature clearly contemplated local governments would purchase liability insurance to protect themselves.
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> (3). Settling of valid claims. The extent of a person's injuries is often unknown for months, and settlement is unlikely to occur under such circumstances. "Medicine is not a field of absolutes," and "has not reached the stage where a physician may always confidently pinpoint the specific ... injury of a patient," or make an accurate prognosis.
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> (4). Repair of defective conditions. It is unreasonable to suppose that the government's ability to discover and repair defective conditions is tied to a notice that a lawsuit will be filed. A defective condition should concern the government without regard to whether a lawsuit against it is contemplated. Local governments regularly react to that concern, but not because of a sixty-day notice under the statute. Experience teaches otherwise. In the routine case under the statute, the government's insurer has promptly completed a thorough investigation whereas the injured citizen does not consult an attorney until after sixty days have passed. To apply section 613A.5 in such a case would be grossly unfair and would not lead, in any way, to a more speedy repair of the defect. Moreover, if repair of defective conditions were a legitimate interest, the legislature would have required notice of

[8] The statutory notice provision at issue in *Miller* had its inception in Iowa law in 1888, which is roughly the same time that similar provisions were incorporated into Michigan law. See Michigan Public Acts of 1895, Act No. 3, Chapter VII, § 7 and Act No. 215, Chapter XXII, § 1.

them whenever a person is injured, regardless of the tort-feasor or any intent to file a claim. [*Id.* at 779-780 (citations omitted).]

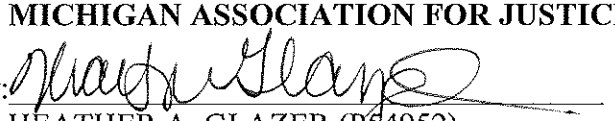
In the event that this Court concludes that the statutory requirements of MCL 124.419 were not met in this case, Amicus maintains that, rather than merely assume that MCL 124.419 is rationally related to stated legislative purposes, as the *Rowland* majority did with MCL 691.1404, this Court should examine each purpose in today's context. Based on the Iowa Supreme Court's observations, there is certainly a question whether these alleged legislative purposes continue to furnish a rational basis justifying the classification resulting from MCL 124.419.

Relief Requested

WHEREFORE, Amicus respectfully requests that this Honorable Court deny Defendant's request for leave to appeal and remand this matter to the trial court for further proceedings or, upon grant of leave to appeal, affirm the decision of the Court of Appeals and remand this matter for further proceedings.

Respectfully submitted,

MICHIGAN ASSOCIATION FOR JUSTICE

By: 

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